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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

INTERCARGO INSURANCE COMPANY f/k/a
INTERNATIONAL CARGO & SURETY CO.
(SURETY FOR M. GENAUER),
Petitioner,

vs.

THE UNITED STATES,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Dated: October 22, 1996

77 pp

QUESTIONS PRESENTED

The decision of the panel majority of the Federal Circuit decided important questions of federal law which have not been, but should be, settled by this Court:

1. Whether the decision of the panel majority is directly contrary to the intent of Congress and eviscerates 19 U.S.C. § 1504?

2. Whether the principles of harmless error apply in this case?

PARTIES TO THE PROCEEDINGS

Petitioner, Intercargo Insurance Company, was the appellee below on the issues presented for review.

Respondent, The United States, was the appellant below on the issues presented for review.

Petitioner, Intercargo Insurance Company, formerly known as International Cargo & Surety Insurance Co., acted as surety for the importer of record, M. Genauer. Intercargo Insurance Company is a wholly owned subsidiary of Intercargo Corporation.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner Intercargo Insurance Company respectfully requests that a writ of certiorari issue to review the judgment (A17)[1] and decision (A1-16) of the United States Court of Appeals for the Federal Circuit, entered May 2, 1996.

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1. Reference to page numbers of the Appendix are preceded by "A", followed by the page numbers.

OPINIONS BELOW

The opinion (A1-16) of the United States Court of Appeals for the Federal Circuit is reported as *Intercargo Ins. Co. v. United States*, 83 F.3d 391 (Fed. Cir. 1996), *reh'g denied, in banc suggestion declined,* 1996 U.S. App. LEXIS 19185 (July 25, 1996). The opinion (A20-26) of the United States Court of International Trade (Slip. Op. 95-37) is reported as *Intercargo Ins. Co. v. United States*, 879 F. Supp. 1338 (Ct. Int'l Trade 1995), *rev'd,* 83 F.3d 391 (Fed. Cir. 1996).

JURISDICTION

The majority opinion (A1-14), dissenting opinion (A15-16) and judgment (A17) of the United States Court of Appeals for the Federal Circuit were entered on May 2, 1996. On July 25, 1996, the Federal Circuit denied Petitioner's Combined Petition for Rehearing with Suggestion for Rehearing In Banc. The jurisdiction of this Court is conferred by 28 U.S.C. Section 1254(1) (1996).

STATUTES AND REGULATIONS INVOLVED

19 U.S.C. Section 1504 provides in relevant part:

§ 1504. Limitation on liquidation

(a) Liquidation

Except as provided in subsection (b) of this section, an entry of merchandise not liquidated within one year from:

(1) the date of entry of such merchandise . . .

shall be deemed liquidated at the rate of duty, value, quantity and amount of duties asserted at the time of entry by the importer of record. Notwithstanding section 1500(e) of this title, notice of liquidation need not be given of an entry deemed liquidated.

(b) Extension

The Secretary may extend the period in which to liquidate an entry by giving notice of such extension to the importer of record in such form and manner as the Secretary shall prescribe in regulations, if -

(1) information needed for the proper appraisement or classification of the merchandise is not available to the appropriate customs officer . . . .

19 U.S.C. § 1504 (1988), amended by Act of Dec. 8, 1993, Pub. L. No. 103-182, title VI, § 641, 107 Stat. 2204 (1993).

Section 159.12 of the Customs Regulations, 19 C.F.R. Section 159.12, provides in relevant part:

§ 159.12 Extension of time for liquidation.

(a) *Reasons* -- (1) *Extension.* The district director may extend the 1-year statutory period for liquidation for an additional period not to exceed 1 year if:

(i) *Information needed by Customs.* Information needed by Customs for the proper appraisement or classification of the merchandise is not available . . . .

(b) *Notice of extension.* If the district director extends the time for liquidation, as provided in paragraph (a)(1) of this section, he promptly shall notify the importer or the consignee and his agent and surety on Customs Form 4333-A, appropriately modified, that the time has been extended and the reasons for doing so.

19 C.F.R. § 159.12 (1990).[2]

STATEMENT OF THE CASE

Under the *Customs Procedural Reform and Simplification Act of 1978* (Pub. L. No. 95-410, Title II, § 209(a), 92 Stat. 902 (1978)), Congress amended the Tariff Act of 1930 by adding a new Section 504 (19 U.S.C. § 1504), which effectively constituted a statute of limitations governing the liquidation of entries of merchandise. Subsection (a) of Section 504 provided, *inter alia*, that an entry not liquidated within one year from the date of entry would be deemed liquidated at the "rate of duty, value, quantity, and amount of duties asserted at the time of entry" by the importer of record. 19 U.S.C. § 1504(a) (1978).

---

2. Pursuant to Supreme Court Rule 14(1)(f), the full texts of 19 U.S.C. Section 1504 and 19 C.F.R. Section 159.12 appear at A29-31 and A31-33, respectively.

Subsection (b) of Section 504 permitted the Secretary of the Treasury ("Secretary") to extend the liquidation period "by giving notice of such extension to . . . the importer of record . . . in such form and manner as the Secretary shall prescribe in regulations." 19 U.S.C. § 1504(b) (1978) (emphasis added). The statute authorized extensions "only" for the reasons stated in the statute (Pub. L. No. 95-410, H.R. Rep. No. 621, 95th Cong., 1st Sess. 25 (1978)), including, "if-- information needed for the proper appraisement or classification of the merchandise is not available to the appropriate customs officer." 19 U.S.C. § 1504(b)(1) (1978) (emphasis added).

To implement this congressional mandate, the Secretary issued Treasury Decision 79-221 (44 Fed. Reg. 46829, August 9, 1979), which stated in pertinent part:

§ 159.12 Extension of time for liquidation

(a) Reasons -- (1) Extension. The district director may extend the 1-year statutory period for liquidation for an additional period not to exceed 1 year if:

(i) Information needed by Customs. Information needed by Customs, for the proper appraisement or classification of the merchandise is not available . . . .

(b) Notice of extension. If the district director extends the time for liquidation, as provided in paragraph (a)(1) of this section, he promptly shall notify the importer or the consignee and his agent and

surety on Customs Form 4333-A, appropriately modified, that the time has been extended **and the reasons for doing so.**

19 C.F.R. § 159.12 (1979) (emphasis added).

Subsequent to the promulgation of Section 159.12 in 1979, Customs began issuing Extension Notices under Section 1504(b)(1) and Sections 159.12(a)(1) and (b) which stated:

Notice of Extension

The liquidation of this entry has been extended, additional time is required by customs to obtain information necessary to process this transaction.

In 1985, Customs inexplicably changed the language of the (b)(1) Notice to read:

Notice of Extension

THIS IS A COURTESY NOTICE.

THE LIQUIDATION OF THIS ENTRY HAS BEEN EXTENDED: ADDITIONAL TIME IS REQUIRED BY CUSTOMS TO PROCESS THIS TRANSACTION. NO ACTION IS NECESSARY ON YOUR PART UNLESS INFORMATION IS SPECIFICALLY REQUESTED BY CUSTOMS.

See A21.

In the trial court, Petitioner, Intercargo Insurance Company ("Intercargo"), presented a Customs Performance Report for Fiscal Year 1990 to establish that Customs may

have changed the Notice due to a significant increase in the transactions it was required to process and a simultaneous reduction of its staff. Customs has been unable to determine or explain why the foregoing language change occurred.

Intercargo acted as the surety for the importer of record, M. Genauer ("Genauer"), on eight entries of merchandise ("Subject Entries") which Genauer filed between September 19, 1989 and November 1, 1989 at the Port of Seattle, Washington. On or about July 21, 1990, and within one year of the date of each respective entry, Customs issued individual Extension Notices to Genauer and Intercargo, purportedly under the authority of Section 1504(b)(1). Each Notice contained the post-1985 language indicated above.

On July 12, 1991, more than one year after the respective dates of entry, Customs liquidated the entries with an increase in duty to reflect certain quota charges which Genauer claimed were not dutiable. Intercargo timely filed a protest contesting the validity of both the extensions and the liquidations. *See* 19 U.S.C. § 1514. Following the denial of its protest, Intercargo paid the contested duties and on August 31, 1992, timely commenced this action by filing a summons in the Court of International Trade ("CIT"). *See* 28 U.S.C. § 2632(b).

On December 8, 1992, Intercargo filed a two-count Complaint challenging the denial of its protest. Count I challenged Customs' discretionary decision to extend the liquidation of the Subject Entries; Count II challenged the validity of the Notices employed by Customs to extend the

liquidations. Jurisdiction of the CIT was based upon 28 U.S.C. Section 1581(a) (1992).

On February 3, 1994, the trial court entered an order permitting Intercargo to voluntarily abandon Count I. The parties' arguments regarding Count II were subsequently submitted for ruling on cross-motions for summary judgment. At the conclusion of the oral argument on February 23, 1995, the trial court ruled from the bench in favor of Intercargo. On March 9, 1995, the trial court issued its opinion and entered judgment in favor of Intercargo and against the United States. *Intercargo Ins. Co. v. United States*, 879 F. Supp. 1338 (Ct. Int'l Trade 1995); A20-28.

The trial court accurately identified the relevant issue, the controlling precedent, and the necessary result:

> Thus, the issue that came before this Court was whether the notice issued to Intercargo complied with 19 U.S.C. § 1504 and 19 C.F.R. § 159.12, and validly extended the liquidation period when the notice did not explicitly contain one of the three statutory reasons set forth in 19 U.S.C. § 1504(b). The Court of Appeals for the Federal Circuit ("CAFC"), has spoken clearly on the subject of notices of extension in *St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 763 (Fed. Cir. 1993). In that case, the CAFC interpreted 19 U.S.C. 1504 *de novo* in reviewing a Court of International Trade decision that Customs had not lawfully extended the liquidation period for contested entries. The CAFC ruled that "[t]he time period may be extended . . . provided that Customs

> notifies the importer of the extension and articulates one of the three statutory reasons for the extension. 19 U.S.C. § 1504(b), (c)." *Id.*, 6 F.3d at 767.
>
> This Court found that the reason given to Intercargo in the present case, that "ADDITIONAL TIME IS REQUIRED . . .," was not a clearly articulated statutory reason for extending liquidation. This Court therefore held the extension not to be valid under the law. Accordingly, plaintiff's motion for summary judgment was granted, and defendant's motion for summary judgment was denied.

A25-26.

The government timely filed an appeal to the United States Court of Appeals for the Federal Circuit pursuant to 28 U.S.C. Section 1295(5), and the majority opinion of the Federal Circuit reversed the CIT. *Intercargo Ins. Co. v. United States*, 83 F.3d 391 (Fed. Cir. 1996); A1-14. The panel majority began its analysis with the Federal Circuit's prior decision in *St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 763 (Fed. Cir. 1993):

> The *St. Paul* court held that under section 1504 the Customs Service had one year within which to liquidate entries unless "properly noticed extensions" were granted "for statutory reasons." 6 F.3d at 770. The applicable regulation, according to the court, required "that Customs notify the importer of the extension and articulate[] one of three statutory reasons for the extension." 6 F.3d at 767.

A5. The panel majority then accurately summarized Intercargo's position:

> Intercargo's argument in this case is based on *St. Paul* and is straightforward. The argument proceeds as follows: (1) *St. Paul* requires that Customs' extension notices articulate one of the three statutory reasons for the extensions; (2) the only applicable statutory ground for obtaining extensions in this case is that "information needed for the proper appraisement or classification of the merchandise is not available to the appropriate customs officer"; (3) the notices in this case did not articulate that statutory ground, but merely stated that Customs needed "additional time" to process the transaction; therefore (4) the extension notices were invalid; and (5) each entry was liquidated by operation of law one year after the date of entry of that merchandise, at the duty rate claimed by Genauer at the time of entry.

A5-6.

Rejecting the government's argument that the Extension Notices here articulated a proper statutory reason and met the "requirement" of *St. Paul*, the panel majority also stated:

> While it is true that the notices advised Intercargo that the time had been extended and gave a reason for the extensions, the reason given was not one of the statutorily authorized reasons. The statutory reason that Customs intended to invoke was that "information needed for the appraisement or classification of the

> merchandise is not available to the appropriate customs officer." 19 U.S.C. § 1504(b)(1) (1988). The notices, however, made no reference to the need for information. We thus agree with Intercargo that the reason given in the extension notices was not one of the reasons set forth in the statute, and that the notices therefore did not satisfy the requirement of the regulation as interpreted by the *St. Paul* court.

A6. Finding that the above "conclusion, however, does not decide this case," the panel majority then applied "the principles of harmless error" in deciding that the government's violation of the *St. Paul* requirement was a mere "procedural error" or "technical defect", and that Intercargo was not prejudiced by Customs' failure to comply with the clear requirement of Section 1504 and Section 159.12. A7-13.

The dissenting opinion by Circuit Judge Rader relied upon both the *St. Paul* decision and the clear intent of Congress in enacting Section 1504:

> This court's decision in *St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 763 (Fed. Cir. 1993), governs this dispute over whether the United States Customs Service (Customs) obtained a valid extension of time for liquidation of Intercargo's entries.
>
> In *St. Paul*, this court held that section 1504 gives Customs one year to liquidate entries unless "properly noticed extensions" were granted "for statutory

reasons." *Id.* at 770. This court stated that Customs must "notify the importer of the extension and articulate[] one of three statutory reasons for the extension." *Id.* at 767. In this case, as this court notes, Customs did not give proper notice. . . .

Section 1504 was passed, in part, to "increase certainty in the process for importers, surety companies and other third parties with a potential liability relating to a customs transaction." S. Rep. No. 778, 95th Cong., 2d Sess. 32 (1978), *reprinted in,* 1978 U.S.C.C.A.N. 2211, 2243. Under the prior law, importers learned years after goods had been imported and sold that additional du[ti]es [sic] were due, or an excess of duties had been paid pending liquidation. *Id.* The 1978 enactment changed the law to address these lengthy and prejudicial delays to importers.

Thus, the Customs' extension notices were improper because they did not give a statutory reason for the extension. These notices did not satisfy the requirement of the regulation as interpreted in *St. Paul.* I would thus affirm the Court of International Trade's holding that the Customs' extension notices were defective.

A15-16.

ARGUMENT

I. The Decision Of The Panel Majority Is Directly Contrary To The Intent Of Congress And Eviscerates Section 1504

In *Chevron U.S.A. Ins. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984), this Court declared:

> If the intent of Congress is clear, that is the end of the matter; for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress.

In enacting the *Customs Procedural Reform and Simplification Act of 1978*, Pub. L. No. 95-410, Title II, § 209(a), 92 Stat. 902, Congress amended the Tariff Act of 1930 by adding a new Section 504 (19 U.S.C. § 1504) ("**Limitation on liquidation**"). Subsection (a) of Section 504 provides, *inter alia*, that an entry not liquidated within one year from the date of entry "shall be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted at the time of entry." 19 U.S.C. § 1504(a). Subsection (b) of Section 504 states:

> **(b) . Extension** – The Secretary may extend the period in which to liquidate an entry by giving notice of such extension to the importer of record in such form and manner as the Secretary shall prescribe in regulations, if-
>
> (1) information needed for the proper appraisement or classification of the

> merchandise is not available to the appropriate customs officer;
>
> (2) liquidation is suspended as required by statute or court order; or
>
> (3) the importer, consignee, or his agent requests such extension and shows good cause therefor.

19 U.S.C. § 1504(b) (emphasis added); A29-30. Since 19 U.S.C. Section 1504 authorizes extensions **"only"** for the reasons stated therein (H.R. Rep. No. 621, 95th Cong., 1st Sess. 25 (1978)), the *St. Paul* court correctly held as a matter of law that the notice must articulate "one of the three statutory reasons for the extension." 6 F.3d at 767. "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n.9.

The Secretary implemented Section 1504's directive to prescribe the "form and manner" of the Notice by promulgating 19 C.F.R. Section 159.12. The plain meaning of the Secretary's words govern unless there is a clearly expressed contrary legislative intent (*see Immigration & Naturalization Serv. v. Stanisic*, 395 U.S. 62, 72 (1969)), and the Secretary is not free to interpret his own regulation so as to nullify its effective intent or wording. *See Bahramizadeh v. Immigration and Naturalization Serv.*, 717 F.2d 1170, 1173 (7th Cir. 1983).

This Court should give due deference to the express language of Section 159.12 because it follows Congress' clear intent and is a substantive rule which effectuates a substantial right granted by Section 1504(a), *i.e.*, the right to have an entry "deemed liquidated". As such, it has the force and effect of law. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 302-03 (1979). This conclusion is even more compelling because when Section 1504 was amended five years after the promulgation of Section 159.12, Congress failed to overrule that portion of the regulation requiring that Notices of Extension state a statutory reason for the extension. Pub. L. No. 98-573, § 191(d), 98 Stat. 2948 (1984). Congress is presumed to be aware of the Secretary's regulations, *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979), particularly where, as here, the regulation was brought to public attention through the rule-making process, including Federal Register publication. *See United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979). *See also Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts.") When Congress amended Section 1504 in 1984, it ratified the requirement that a statutory reason be stated in the Extension Notice as a valid exercise of the Secretary's delegated authority under Section 1504(b). *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975). *See also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381-82 n.66 (1982).

According to the plain language of Section 1504 (*i.e.* "**by**"), the Notice is more than a mere warning or a ministerial notification of a completed administrative decision -- **it is the act of extension itself!** Unlike all other notices

issued by Customs, a Notice of Extension does not condition or require the exercise of a substantive right; rather, it postpones and in most cases extinguishes a party's substantive right to have an entry "deemed liquidated" under Section 1504(a). *Compare* 19 C.F.R. § 174.30 (1995) (notice of denial of a protest); 19 C.F.R. § 172.1 (1995) (notice of liquidated damages).

Using the ordinary, contemporary meaning of the words employed by Congress, the plain meaning of Section 1504, as implemented by Section 159.12, is that Customs can extend the liquidation of an entry only by issuing a Notice which articulates a statutory reason for that extension. A Notice which does not articulate a statutory reason does not satisfy the necessary prerequisites specified by Congress and the Secretary, and any affected entries are "deemed liquidated" by operation of law. *See* 19 U.S.C. § 1504(a); A29. As this Court has noted:

> [I]n the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.

Mohasco Corp. v. Silver, 447 U.S. 807, 826 (1980).

After conceding that the Notices here did not articulate one of the reasons set forth in Section 1504 and "did not satisfy the **requirement** of the regulation [19 C.F.R. § 159.12] as interpreted by the *St. Paul* court," the panel majority concluded that this substantive violation was a mere "technical defect". A6, 13 (emphasis added). This

conclusion eviscerates Section 1504 and sanctions conduct by Customs directly contrary to its own regulation, Section 159.12. Thus, Customs is no longer required to articulate one of the three statutory reasons for extension contained in Section 1504(b). This result is contrary to the clear intent of Congress in enacting Section 1504:

> The provisions adopted by the committee would **increase certainty** in the customs process for importers, surety companies, and other third parties with a potential liability relating to a customs transaction. Under the present law, an importer may learn years after the goods have been imported and sold that additional duties are due, or may have deposited more money for estimated duties than are actually due but be unable to recover the excess for years as he awaits liquidation. Surety companies, which are jointly liable for additional duties, would be better able to **control** their **liabilities**. Sureties would also be better protected against losses resulting from dissolution of their principals in instances where there has been **undue delay**.

S. Rep. No. 778, 95th Cong., 2d Sess. 31 (1978), *reprinted in,* 1978 U.S.C.C.A.N. 2211, 2242-43 (emphasis added). *See also* H.R. Rep. No. 621, 95th Cong., 1st Sess. 25 (1978). As Circuit Judge Rader correctly noted in his dissent:

> Section 1504 was passed, in part, to "increase certainty in the [customs] [sic] process for importers, surety companies, and other third parties with a potential liability relating to a customs transaction

. . . ." Under the prior law, importers learned years after goods had been imported and sold that additional du[ti]es [sic] were due, or an excess of duties had been paid pending liquidation. . . . The 1978 enactment changed the law to address these lengthy and prejudicial delays to importers.

A16. *See also Morton v. Ruiz*, 415 U.S. 199, 232 (1974) (agency procedures must "conform to the law" and be "consistent with the governing legislation").

II. The Principles Of Harmless Error Do Not Apply In This Case

The panel majority misapprehended or overlooked both the law and the facts in concluding that *St. Paul* was not dispositive and that the principles of harmless error must be applied to this "procedural error". A12-13. This Court should exercise its supervisory power to correct this misapplication of the harmless error principles by the Federal Circuit. *See* S. Ct. R. 10(a).

A. Section 1504 Specifies The Consequences Of Noncompliance

Apparently focusing only on subsection (b) of Section 1504, the panel majority erroneously held: (1) that the "requirement" of *St. Paul* "does not decide this case"; (2) that "[t]here remains the question of what consequence should flow from the defect in the notices"; and (3) "that neither the statute nor the regulation dictates that the necessary

consequence of a defect in the extension notice is to render the extension void." A6, 8.

The principles of harmless error do not apply in cases where Congress has specified the consequences of noncompliance. *See School Dist. of the City of Allentown v. Marshall*, 657 F.2d 16, 20 (3d Cir. 1981). 19 U.S.C. Section 1504(a) clearly specifies the consequences for a failure by Customs to articulate one of the three reasons for extension enumerated in 19 U.S.C. Section 1504(b):

> **(a) Liquidation.** Except as provided in subsection (b) of this section an entry of merchandise not liquidated within one year from:
>
> (1) the date of entry of such merchandise . . .
>
> **shall be deemed liquidated** at the rate of duty, value, quantity, and amount of duties asserted at the time of entry by the importer of record. . . .

19 U.S.C. § 1504(a) (emphasis added); A29-31. Applying the "requirement" of *St. Paul*, the trial court (and the dissent) correctly concluded that the purported extensions were "not . . . valid under the law [Section 1504(b)]" and that the Subject Entries were deemed liquidated at the time of entry under Section 1504(a). A16, 26. The opinions relied upon by the panel majority in applying its harmless error analysis are distinguishable because each case clearly held that the relevant statute did not specify the consequences for noncompliance. *See, e.g., Brook v. Pierce County*, 476 U.S. 253, 259 (1986); *United States v. James Daniel Good Real*

Property, 114 S. Ct. 492, 506 (1993); *Kemira Fibres Oy v. United States*, 61 F.3d 866, 871-72 (Fed. Cir. 1995); *Diaz v. Department of the Air Force*, 63 F.3d 1107, 1109 (Fed. Cir. 1995); *Sea-Land Serv., Inc. v. United States*, 735 F. Supp. 1059, 1063 (Ct. Int'l Trade 1990), *aff'd*, 923 F.2d 838 (Fed. Cir. 1991). A7, 10-13.

B. Any Action By Customs Contrary To Its Own Regulation Is Illegal And Has No Effect

Agency regulations have "the force and effect of law." *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 265 (1954). Since it is undisputed that Customs did not articulate one of the three reasons specified by its own regulation, the Extension Notices here were simply invalid. The Third Circuit, relying upon this Court's decisions, has declared:

> It is a well established proposition that an agency is bound by its regulations. *United States v. Nixon*, 418 U.S. 683, 695-96 . . . (1974), *Vitarelli v. Seaton*, 359 U.S. 535, 539 . . . (1959); *Service v. Dulles*, 354 U.S. 363, 372-73 . . . (1957) . . . . Failure to comply with regulations is a fatal flaw to the administrative action . . . . *An action undertaken by an agency contrary to its regulations is illegal and of no effect. Vitarelli v. Seaton*, 359 U.S. at 545 . . .; *accord, Accardi v. Shaughnessy*, 347 U.S. 260, 268 . . . (1954). Since the Board did not comply with its regulations . . ., it is to be given no effect . . . .

> To permit the agency to do it over again, this time correctly, gives the agency no incentive to comply at the start . . . . Failure to comply with its regulations renders the agency's act null.

Kelly v. Railroad Retirement Bd., 625 F.2d 486, 491-92 (3d Cir. 1980) (emphasis added). Again relying on this Court's decisions, the Third Circuit later held as follows in a closely analogous case:

> The ALJ's conclusion that the 120-day period was "advisory" is puzzling. The language of the regulation offers no support for that appraisal. Moreover, the statutory language shows that Congress was concerned with delay and wanted the Secretary to promptly resolve complaints. A regulation that failed to comply with that directive would lack validity. *See International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551 . . . (1978) . . . .
>
> Whether Lehigh had suffered prejudice from the delay is not relevant. Agencies must observe not only time limits prescribed by Congress, but also their own procedural regulations. *See United States v. Nixon*, 418 U.S. 683, 695-96 . . . (1974) . . . . As the Supreme Court said in *Mohasco v. Silver*, 447 U.S. 807, 826 . . . (1980), "Strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." This teaching of *Mohasco* loses none of its force when the agency itself imposes the procedural limitations.

> Since the Secretary failed to follow the requirements specified by Congress or even his own regulation, it follows that the order may not be enforced.

Lehigh Valley Manpower Program v. Donovan, 718 F.2d 99, 102 (3d Cir. 1983); *accord*, *Frisby v. United States Dept. of Housing & Urban Dev.*, 755 F.2d 1052, 1055-56 (3d Cir. 1985); *Smith v. Resor*, 406 F.2d 141, 145-46 (2d Cir. 1969). In this case, it is equally clear that Congress was concerned with delay by Customs and uncertainty in the importing community when it enacted Section 1504, and Section 159.12 was promulgated by the Secretary to resolve those concerns. Since Customs failed to follow its own regulation, the purported Extension Notices were null and void. *See Athas v. United States*, 597 F.2d 722, 726 (Ct. Cl. 1979) ("*void ab initio*"); *United States v. Jones*, 368 F.2d 795, 799 (2d Cir. 1966).

C. Section 1504 Is A Jurisdictional Bar Or Statute Of Limitations Whose Requirements Are Mandatory

1. Section 1504 Is A Jurisdictional Bar

In *Brook v. Pierce County*, 476 U.S. 253, 262 (1986), a decision relied upon by the panel majority (A10), this Court distinguished cases where "courts should read a [statutory] command . . . as a statute of limitations or jurisdictional bar." The principles of harmless error do not apply where "the statutory language and legislative history" indicate that "Congress intended to impose a jurisdictional limitation on

agency action." *Id.* at 258, 262-63; *cf. Service v. Dulles*, 354 U.S. 363.

"[W]here a statute both requires the agency to act within a certain time period and specifies a consequence if that requirement is not met, the agency will lose jurisdiction to act." *Friends of the Crystal River v. United States Envtl. Protection Agency*, 35 F.3d 1073, 1080 (6th Cir. 1994). 19 U.S.C. Section 1504 (**Limitation on liquidation**): (1) provides that Customs "may extend the period in which to liquidate an entry by giving notice" and articulating one of the three statutory reasons [Section 1504(b)]; and (2) specifies that if Customs does not give the required notice, an entry "shall be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted at the time of entry." A29. Based upon its clear language and plain meaning, Section 1504 is a jurisdictional bar, and "the term 'jurisdictional' refers to a statutory requirement that, if not complied with by the agency, would deprive the agency of all power to act on the matter." *Milwaukee County v. Donovan*, 771 F.2d 983, 986 n.2 (7th Cir. 1985); *accord, City of Edmonds v. United States Dept. of Labor*, 749 F.2d 1419, 1422 (9th Cir. 1984) (section at issue is "jurisdictional" and Congress intended to preclude any action if the Secretary failed to comply with it); *School Dist. of the City of Allentown v. Marshall*, 657 F.2d 16, 18 (3d Cir. 1981) (if "jurisdictional", noncompliance with a statutory requirement "is an absolute bar to administrative action"). This Court has frequently held that similar statutory requirements are jurisdictional. *See, e.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974); *McDonnell Douglass Corp. v. Green*, 411 U.S. 792, 798 (1973). The reliance of the panel

majority on *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), is misplaced, since in *Torres* this Court held that failure to specify a party as an appellant was a jurisdictional bar under Rule 3(c) of the Federal Rules of Appellate Procedure.

The argument for raising a jurisdictional bar in this case is strengthened by the fact that Section 1504 specifies the consequences for noncompliance. *Cf. Milwaukee County*, 771 F.2d at 988. However, a statute or regulation can still be jurisdictional even if it fails to specify the consequences for noncompliance. *See City of Edmonds*, 749 F.2d at 1422; *See generally Mohasco Corp. v. Silver*, 447 U.S. 807.

2. Section 1504 Is A Statute Of Limitations

Even if Section 1504 is not a jurisdictional bar which absolutely deprived Customs of all power to act upon the Subject Entries, the legislative history of Section 1504 establishes beyond question that Congress intended it to be a statute of limitations. As the Senate Committee Report on the *Customs Procedural Reform and Simplification Act of 1978* noted: "There is no present law requiring liquidation to be completed within a **specific time period.**" S. Rep. No. 778, 95th Cong. 2d Sess. 31 (1978), *reprinted in*, 1978 U.S.C.C.A.N. 2242 (emphasis added). The House Committee Report likewise stated: "Section 210 would amend the Tariff Act of 1930 by adding a new section 504 which would **place a limit on the time** in which the Customs Service has to liquidate an entry." H.R. Rep. No. 621, 95th Cong. 1st Sess. 24 (1978) (emphasis added).

Finally, the inclusion in Senate Report No. 778 of references to "increase[d] certainty", control of liabilities and the prevention of "undue delay" establish beyond peradventure that Congress intended Section 1504 to be "a limitations statute". *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 395 (1982).

In *Delaware State College v. Ricks*, this Court reiterated the importance of statutes of limitations:

> It should not be forgotten that time-limitations provisions themselves promote important interests; "the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones."

449 U.S. 250, 259-60 (1980), *quoting*, *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975); *see also Mohasco Corp.*, 447 U.S. 807.

The trend in this Court's decisions away from a "jurisdictional" label and toward a "limitations" label has been discussed at length. *See, e.g., Zipes*, 455 U.S. at 395 n.12; *Coke v. General Adjustment Bureau, Inc.*, 640 F.2d 584, 588-89 (5th Cir. 1981). The principal distinction is that a "jurisdictional" requirement is an absolute bar, while a statute of limitations is subject to waiver, estoppel and tolling. *See Zipes*, 455 U.S. at 392-98. In this case, that distinction does not make a difference, since the principles of harmless error do not apply to either a jurisdictional bar or a statute of

limitations (*see Brooks v. Pierce County*, 476 U.S. at 262-63), and Congress clearly intended Section 1504 to be either a jurisdictional bar or a statute of limitations. Moreover, this Court has strictly enforced Congress' intent regarding such "time limitations" and the avoidance of "stale or dormant claims." *See, e.g., Mohasco Corp.*, 447 U.S. at 818-26. Thus, the Third Circuit stated as follows in *School District of the City of Allentown*, 657 F.2d at 20:

> We may not ignore the legislative intent to grant the defendant a period of repose after the limitations period has expired.
>
> Specifically, the Secretary erred in making lack of prejudice . . . a determining factor in permitting a late filing. Any limitation period is arbitrary in nature. The choice of appropriate time is not entrusted to the administrative agency or to the courts. It is the result of legislative determinations made after weighing the various interests at stake . . . . Obviously, Congress intended that complaints be made and resolved within a very short time after the alleged violation occurred. It is not for us or the Secretary to casually ignore the statutory limitation.

In finding that the requirement of Section 1504 was a mere "procedural error" which did not prejudice Intercargo, the panel majority jejunely and impermissibly ignored the clear limitation intended by Congress.

3. Section 1504 Is Mandatory

Instead of applying "jurisdictional bar" or "statute of limitations" labels, several United States courts of appeal have described this Court's decisions as holding that a statutory or regulatory requirement was "mandatory".

For example, in *City of Edmonds v. United States Dept. of Labor*, 749 F.2d 1419 (9th Cir. 1984), the Ninth Circuit equated the term "mandatory" with the term "jurisdictional" and relied upon this Court's "mandatory" holding in *Mohasco Corp.* to reverse administrative action not in compliance with the relevant statute. 749 F.2d at 1421-23. *See also Pierce County v. United States*, 759 F.2d 1398, 1402 (9th Cir. 1985); *Milwaukee County v. Donovan*, 771 F.2d 983 (7th Cir. 1985).

Once again, the terminology used does not result in a different conclusion. Irrespective of whether Section 1504 is categorized as a "jurisdictional bar", a "statute of limitations" or "mandatory", noncomplying administrative action is null and void and should be reversed.

D. The Principles Of Harmless Error Do Not Apply And The Issue Of Prejudice Is Irrelevant

As this Court warned in *Chapman v. California*, 386 U.S. 18, 22 (1967): "[W]e must recognize that harmless-error rules can work very unfair and mischievous results . . . ."

Contrary to the belabored analysis of the panel majority in this case, all of the above decisions hold that the principles of

harmless error do not apply and that the issue of prejudice is simply irrelevant. As Judge Rader noted in his dissent, the panel majority "inaccurately analogizes Customs' defective notices to procedural errors in notices of appeal." A16. There is simply no relationship between Customs' failure to comply with Section 1504 and Section 159.12 and the analogy chosen by the panel majority--a *pro se* inmate mistakenly filing an informal brief instead of the notice of appeal required by Rule 3 of the Federal Rules of Appellate Procedure. In *Love v. Pullman*, 404 U.S. 522, 527 (1972), this Court observed that "[s]uch technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Quoted in, General Adjustment Bureau, Inc.*, 640 F.2d at 587; *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 475 (D.C. Cir. 1976). Likewise, any inquiry regarding prejudice is simply irrelevant:

> This prejudice to defendant, or lack of it, is simply irrelevant when Congress has drawn a line at the point where it believed claims should be barred.

School Dist. of the City of Allentown, 657 F.2d at 20; *accord, Lehigh Valley*, 718 F.2d at 102 ("Whether Lehigh suffered prejudice from the delay is not relevant").

In this case, the panel majority rejected Intercargo's claim of prejudice (that it would be required to pay additional customs duty) by observing that "[a] party is not 'prejudiced' by a technical defect simply because that party will lose its case if the defect is disregarded." A13. The majority then went on to observe that "[p]rejudice, as used in this setting,

means injury to an interest that the statute, regulation, or rule in question was designed to protect." *Id.*

Intercargo respectfully submits that any subsequent conduct by Customs which is inconsistent with liquidation by operation of law is *per se* prejudicial, since it requires a surety or importer to pay Customs a sum of money which, under the law, it should not have to pay. As the dissent correctly observed, "Customs' defective notices have prejudiced Intercargo," and "Section 1504 was passed . . . to 'increase certainty in the process for . . . surety companies . . . with a potential liability relating to a customs transaction.'" A16. If the ability to challenge the reason for an extension is viewed as the only cure to the inherent prejudice resulting from Customs' failure to state a statutory reason for an extension, then the requirement of providing notice in a proper form and manner is totally negated. *See Griffin v. Harris*, 571 F.2d 767, 772 (3d Cir. 1978) (the "intended beneficiaries of the statute" are entitled to its benefits as "a matter of statutory entitlement").

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that a writ of certiorari issue to review the judgment and decision of the Court of Appeals for the Federal Circuit.

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